

US EPA ARCHIVE DOCUMENT



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF WATER

Herschel T. Vinyard
Secretary
Florida Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

Dear Secretary Vinyard:

Thank you for soliciting EPA's views on the Florida Department of Environmental Protection (FDEP) draft rule on numeric nutrient criteria for inland and estuarine waters. We understand that you have submitted language to the Florida Administrative Weekly for publication as a proposed rule. EPA has reviewed FDEP's October 24, 2011 draft of the rule. As we discussed, sharing EPA's preliminary evaluation of that draft rule represents an important opportunity to affirm the Agency's support for FDEP's efforts to address nutrient pollution.

While EPA's final decision to approve or disapprove any nutrient criteria rule submitted by FDEP will follow our formal review of the rule and record under section 303(c) of the Clean Water Act (CWA), our current review of the October 24, 2011 draft rule, guidance, and other scientific and technical information supporting the draft rule, leads us to the preliminary conclusion that EPA would be able to approve the draft rule under the CWA.

We understand that the rulemaking package must undergo review and potential modification by the State's Environmental Review Commission (ERC) and Legislature. While EPA appreciates the work by FDEP in crafting a draft rule that appears to comport with the CWA, the Agency's analysis of the draft rule and its consistency with the CWA could change should modifications be made before and/or during the State ERC or legislative process or our review of the technical information and public comments identifies reasons why the final rule does not meet the requirements of the CWA.

Should EPA formally approve FDEP's final nutrient criteria as consistent with the CWA, EPA would initiate rulemaking to withdraw federal numeric nutrient criteria for any waters covered by the new and approved state water quality standards.

Below we have summarized our view of the principal provisions of the state's October 24, 2011 draft rule.

Springs and Lakes

For spring vents, FDEP's draft numeric criteria are consistent with the State's longstanding analysis of the applicable data and science related to spring vents. EPA views this approach and

resulting criteria as consistent with the Clean Water Act and believes these criteria would operate to assure protection of the State's designated uses for springs.

For lakes, FDEP's draft rule reflects a scientifically supportable stressor-response analysis that links appropriate levels of TN and TP in a lake to corresponding concentrations of the response variable chlorophyll *a* for particular lakes classified as indicated in the table by alkalinity and color. EPA views this approach and resulting criteria as consistent with the Clean Water Act and believes these criteria would operate to assure protection of the State's designated uses for lakes.

Estuaries

EPA supports FDEP including criteria for some estuaries in this rulemaking as a first step towards adopting criteria for all estuaries. EPA's initial review of the draft numeric criteria and the underlying methodologies relied upon by the State indicate that the State's approach is similar to the approach EPA is using in developing proposed criteria for estuaries in Florida. EPA also appreciates FDEP's regulatory commitment to a formal and public schedule for establishing final criteria for the two remaining groups of estuaries, the first by 2013, and the second by 2015. We are, of course, unable to offer a view on the remaining two groups of estuaries that are scheduled for future completion, but we are confident that elements and components of the science and technical approach the State is considering for the currently draft estuary criteria can be successfully applied to the remaining estuaries. As you know, EPA is under Consent Decree obligations to propose and promulgate criteria for estuarine and coastal waters in 2012. Final adoption by FDEP of the draft criteria for the initial group of estuaries, and progress toward completing the regulatory process for the remaining estuaries on the schedule set out in the draft rule will be important to EPA in considering seeking any adjustments to those deadlines.

Rivers and Streams

The FDEP draft rule includes numeric thresholds for TN and TP in streams that are used to interpret the narrative nutrient criterion where a site-specific interpretation (e.g., TMDL, SSAC, Level II WQBEL) has not been established. These threshold values are the same values that EPA finalized in our inland waters rule. Under FDEP's draft rule, the criteria will be applied in combination with biological information to determine if the water is attaining its uses. This "biological confirmation approach" to determining the nutrient health of a stream is one that several states currently have under development and is an approach EPA is prepared to support if properly constructed with appropriate numeric end-points for assessing biological information in combination with numeric criteria.

FDEP's draft rule provides numeric end-points (metrics) for assessing the health of stream fauna through the use of the Stream Condition Index (SCI), and provides in guidance how FDEP will assess stream flora health. While FDEP's biological health assessments would be more robust if metrics were included in the rule for assessing all of the biological information, our preliminary review indicates that the combination of draft rule language and guidance can be implemented in a way that protects the designated uses of the stream or river. EPA understands that where there is insufficient biological information to confirm stream health, FDEP will use the nutrient stream thresholds for 303(d) listing decisions, TMDL development, and NPDES permitting decisions. If this understanding is correct, EPA's preliminary conclusion is that the draft rule, in

combination with specific guidance language, can be implemented in a manner that is protective of the designated uses of Florida's streams and rivers.

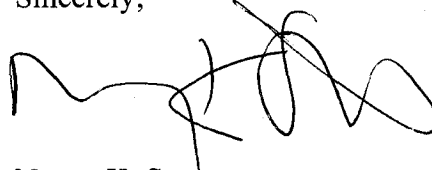
Canals

EPA understands that the FDEP draft rule covers all Class III inland waters in Florida, except for canals in South Florida. EPA also understands, however, that there is interest from specific stakeholders in removing some canals outside of South Florida from coverage under this rule. Should these waters be removed from the rule, EPA would be unable to withdraw its promulgated numeric nutrient criteria for these waters.

Conclusion

We appreciate the opportunity to review the draft rule and we look forward to receiving the final package after the rule is finally promulgated and ratified by the State Legislature. The draft regulatory numeric criteria developed by FDEP represent very significant progress in protecting the State's unique aquatic resources.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nancy K. Stoner', with a stylized, looping flourish at the end.

Nancy K. Stoner
Acting Assistant Administrator